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NOTES

WHEN DOES THE OWNER WHO HAS PARTED WITH PHYSICAL POSSESSION HAVE SUCH RIGHT TO POSSESSION AS WILL ENABLE HIM TO RECOVER UNDER AN INSURANCE POLICY COVERING THEFT, ROBBERY, LARCENY AND PILFERAGE?

By

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There has been a recent change in the provisions and conditions of these policies, but, generally, they insure against theft, robbery and pilferage, except by a person or persons living in the same household or by one of the insured's employees. These policies also except any loss suffered where the insured voluntarily parts with either title or possession of the vehicle, whether or not he was induced to do so by any fraudulent scheme, trick, devise or false pretense of any nature. The policies also exclude against recovery in the case of any wrongful conversion, embezzlement or secretion by a mortgagee, vendee, or any other person in lawful possession of the insured property under a mortgage, conditional sale, lease or other contract or agreement, whether written or verbal.

Most states have held that the provision against theft of an automobile does not preclude a recovery where the owner has merely placed it in temporary custody of another person without intending actual transfer of possession.[1]

These cases treat one having temporary possession of the vehicle, either to repair the vehicle or for some other purpose of the owner, as having only custody. Some courts have gone so far as to hold that the delivery of possession to one who might later acquire the right of permanent possession is delivery of only temporary custody. That appears to this writer to ignore the prohibition in the policy against the voluntary parting with possession by the owner.[2] Those cases which reach the same result, where voluntary possession is turned over to another party, for a purpose other than to do something for the owner, and then later an intent to steal the car comes to the mind of the prospective purchaser or the party in possession, also apparently ignore the prohibition in the policy against a voluntary turning over of possession. The question arises as to when the intent to convert must come into being.[3]

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1 See 109 A. L. R. 1080; Bennett Chevrolet, A. L. R. 1077; 22 R. C. L. 80; Security Insurance v. Sellers, Salmons & Signor Motor Co., 235 S. W. 617 (1921).

2 Tripp v. United States Fidelity Insurance Co., 44 P.2d 236 (1935).

3 Note under Larceny, 32 Am. Jur., § 56, p. 948, particularly the statement on p. 960 to the effect that the felonious intent must exist at the time of the taking and carrying away, with the exceptions noted there. See also 52 C. J. S. 826.

In the case of the *National Safe Deposit Company v. Stead,*[4] the Supreme Court stated as follows:

> "Both in common speech and in legal terminology, there is no word more ambiguous in its meaning than possession. It is interchangeably used to describe an actual and constructive possession which often so shade into each other that it is difficult to say where one ends and the other begins. A constructive possession is defined to be a possession in law without possession in fact. Personal property in the hands of an agent or bailee has been held to be in the constructive possession of the bailor."

Those cases holding that the intent to commit larceny can come into being after possession is once obtained apparently give a wider definition to the term "theft" than is given to "larceny".

In *Allen v. Berkshire Mutual Fire Insurance Company,*[5] the Vermont court said:

> "Theft is a wider term than larceny, including other forms of wrongful deprivation of the property of another and acts constituting embezzlement may be properly so called."

But, in that case, the car owner had directed the purchaser to return the car. The purchaser had promised to return it the following Monday, so the Vermont court pointed out that the purchaser was only a naked bailee of the car.

In the case of *Jacobson et al. v. Aetna Casualty and Surety Company,*[6] the Supreme Court of Minnesota reversed the lower court and directed a judgment in favor of the defendant averring that there had been a voluntary parting and surrender of possession of the car. The Minnesota court pointed out the difference between possession, constructive possession and custody. In this case, the plaintiff operated a garage and was approached by a prospective purchaser who wanted to trade in another car. A tentative deal was made in which he was to receive an old car and a check for $375.00. The prospective purchaser took the car for a ride before the check had been given and never returned with it. The lower court held that the automobile had been stolen. The question was whether or not the dealer had voluntarily parted with possession within the meaning of the exclusionary clause of the policy. The plaintiff claimed the purchaser only acquired custody of the automobile, while the defendant contended he had obtained possession. After pointing out that at common law larceny, required a trespass, that is, the taking from the possession of another without the consent of the owner, the court said this principle was later modified in the cases of servant, and the rule as to fraudulent conversion came into being. Later, as to the master and servant relationship, it was held that the master had constructive possession of the car, while the physical

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4 232 U.S. 58, 58 L. Ed. 504 (1914).
5 168 Atl. 698 (1933).
6 46 N. W.2d 868 (1951).

possession was in the servant. The court defined constructive possession as where the owner intentionally gives physical possession of the property to another for the purpose of having him do some act for the owner either to or with the property. In the *Jacobson* case the court stated:

> "If the controlling reason or primary purpose for which the surrender of possession is made belongs to the owner, he retains constructive possession. Where the owner retains constructive possession, the party to whom bare control of the property has been entrusted for the owner's purpose does not have possession but only custody."[7]

The Minnesota Supreme Court said that unless an exclusionary clause could be held to have no meaning at all, it is difficult to understand how one can give it any meaning other than the exclusion coverage of voluntary parting with actual possession. The court continued:

> "It follows that, if the owner voluntarily surrenders physical possession of his automobile to a third party with the intent that the recipient third party shall exercise exclusive dominion or control of the vehicle, temporarily or otherwise, solely or primarily for its use or purpose . . . as distinguished from the use or purpose for the direct benefit of the owner . . . then the insured has voluntarily surrendered possession within the meaning of the exclusionary clause of the policy and there is no insurance coverage."[8]

The court then went on to say that the fact the owner, in surrendering physical control, might have been motivated by the desire of some indirect benefit, was immaterial. In this regard, the court concluded:

> "In other words, a voluntary surrender of possession, within the meaning of the policy's exclusionary clause, is effective only when the surrender of physical control is accompanied by an intent that the control so surrendered, though it be of only temporary duration, shall be exclusively vested in the recipient and shall by him be exercised, at his pleasure, for the immediate and direct accomplishment of a purpose or use belonging to such recipient."[9]

Reviewing the Pennsylvania cases, we have the recent case of *Hilliard Lumber Company v. Harleysville Mutual Casualty Company,*[10] in which the Court said, "By theft is meant larceny in its common law sense."

The Court then continued:

> "At common law, larceny consists in the taking and carrying away of the personal property of another with the mind of a thief; that is, with the specific intent to deprive the owner permanently of his property."

Thus, we see that the Pennsylvania Superior Court has said that theft in automobile policies means larceny in its common law sense.

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7 46 N. W.2d 868, 871 (1951).
8 46 N. W.2d 868, 872 (1951).
9 Ibid.
10 175 Pa. Super. 94, 96 (1954).

In *Slomowitz v. Union Insurance Company of Canton, Ltd.*,[11] a car was taken from a garage by a former employee. After saying that the felonious intent may be established from circumstantial evidence, and also after saying that the same degree of proof was not required to prove the larceny as would be required in a criminal case, the court said the question as to whether or not there was a criminal intent when the car was taken was for the jury.

In *Seither, Jr. v. Pennsylvania Manufacturing Association Casualty Insurance Company et al.*,[12] a car was put in a garage for repair and the garageman took it out and wrecked it. The court said there must be a felonious intent to appropriate another's property permanently, and the burden rests on the plaintiff to convince the jury by a preponderance of the evidence of the intent to steal the car. In this case the Pennsylvania Superior Court said there was no evidence that would sustain such an intent, and the judgment of the lower Court was reversed.

In *Gillespie v. Export Insurance Company*,[13] a person drove the car of another away from a party and the Superior Court said there was no felonious intent to steal the car shown, so the judgment was reversed.

In a recent case,[14] Judge Ivan Walker of Centre County, specially presiding, quoted the case of *Hilliard Lumber Company v. Harleysville Mutual Casualty Company*,[15] and stated that theft meant larceny in its common law sense. In this case the plaintiff alleged that he had turned the motor vehicle over to a prospective purchaser for a ten days trial. There were no restrictions as to where the trial was to be held or the manner in which the car was to be driven during that period. Judge Walker held that the plaintiff had failed to sustain the burden on him of showing a theft by a preponderance of the evidence.

We therefore feel that in Pennsylvania, if we exclude those cases of a master and servant or those cases where a car is taken to a garage or where goods are left with someone at a hotel for something to be done to them for the owner, that where voluntary possession is delivered to another with the intention that physical possession may never be returned to the original owner, the exclusionary provision of the policy comes into effect. The plaintiff must clearly show, by creditable evidence, such facts as take it out of the exclusionary provision of the policy.

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11 90 Pa. Super. 366 (1927).
12 104 Pa. Super. 260, 159 Atl. 53 (1932).
13 114 Pa. Super. 398, 174 Atl. 602 (1934).
14 Bernard W. McBee and Harry Kuhn v. Carpenter Mutual Fire Insurance Co., tried in Clearfield County, No. 355, November Term, 1952.
15 175 Pa. Super. 94 (1954).